***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

76-7173

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MICHAEL MC SWEENEY,

Plaintiff-Appellant,

-against-

M. J. RUDOLPH CO.,INC., M. J. RUDOLPH CORP.,
YAMASHITA SHINNIHON LINE and
INTERNATIONAL TERMINAL OPERATING CO.,INC.,

Defendants-Appellees.

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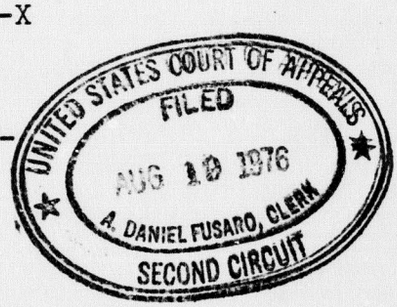


BRIEF ON BEHALF OF THE DEFENDANT-APPELLEE INTERNATIONAL TERMINAL OPERATING CO.,INC.

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# THE BRIEF OF THE DEFENDANT-APPELLEE INTERNATIONAL TERMINAL OPERATING CO.,INC.

## PRELIMINARY STATEMENT

This is an appeal from a judgment entered after trial before the Hon. Richard Owen and the jury on March 18 through 23, 1976 in the United States District Court for the Southern District of New York. At the close of plaintiff's case the trial judge granted motions to dismiss the complaint as to defendants Yamashita Shinnihon Line and International Terminal Operating Co.,Inc. Also granted at that time was a motion by defendants Rudolph to dismiss the negligence cause of action. The remaining claim of unseaworthiness of the Rudolph vessel was decided by the jury which rendered a verdict in favor of said defendants. Plaintiff appeals from the dismissals by the District Court as well as the jury verdict (551).

## QUESTIONS PRESENTED

1. WAS THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT

AS TO APPELLEE INTERNATIONAL TERMINAL PROPER?

## FACTS

Appellant's statement of facts includes almost all of the facts necessary on this appeal and appellee International Terminal will not burden this Court with a repetition. This statement will include only such facts as are relevant to the appeal with reference to appellee International Terminal (ITO). Plaintiff claimed that ITO was negligent in failing to provide plaintiff with assistance in changing the two part block of the floating crane to a four part block after assistance was allegedly offered by an ITO employee.

Plaintiff also claims that ITO's Marine Superintendent cursed and swore at him when he discovered that the floating crane had been supplied with the wrong block. Apparently "Joe Chuck" was angered because the operation was delayed because of the necessity of changing from a two part to a four part block (38A).

Plaintiff said that he asked for some help in changing the block but Joe Chuck refused and told plaintiff to change it himself because he had had four or five hours at the pier on the previous day when it had rained and had failed to do it (42A).

He complained that he had men standing idle because the block had not been changed (44A).

The four part block was on the deck of the R-5. The floating crane engineer lowered the load that was at the end of the two part block and plaintiff took the hook attached to the two part block and went aboard the R-5. He then hooked the four part block onto the two part block and it was swung over and the crane proceeded to boom down so it would eventually rest on the pier (49A). When it was five or six feet above the surface of the pier plaintiff put his hands on the hook of the four part block which suddenly twisted and lurched causing plaintiff to have a severe pain in the back and he fell over onto the pier (50A).

Another ITO employee, "Joe the Harbor Master" had heard the previous conversation between plaintiff and "Joe Chuck", and said he would help in changing the block. At the time plaintiff was attempting to guide the block into proper position no one was helping him. He was not sure where the harbor master was at this point; he might have been standing behind him (121A).

When questioned closely by the Court on this point the following occurred (126-127A): "The Court: But he

wasn't in evidence helping you, I think that's what you said.

The Witness: Your Honor he said he would help me and I proceeded to go ahead about doing my job, and I put my hands on this block, and within an instant I was injured. I was lying on the ground. I don't know if the man was walking behind me or if he was going to attempt to help me. He said he was going to help me, that's all I know.

The Court: What did you ask him to do?

The Witness: He volunteered to help me.

The Court: But what did you ask him...did you ask him to do anything when this block was coming down, this thousand pound block? Did you say, stand over here and do this, help me with this movement, push it this way?

The Witness: No. He volunteered to help me, your Honor.

The Court: All right. When this thing was coming down he was behind you somewhere and you didn't even see him?

The Witness: I assumed he was behind me.

The Court: In any event you didn't see him.

The Witness: I didn't see him.

The Court: And you didn't ask him to do anything?

The Witness: No."

When asked why he failed to request help from his own employer plaintiff's answer was that the Rudolph office was not open at eight o'clock and there was no place that he could have asked for help at that hour. He also testified that the custom and practice on the waterfront if he could not get help and could not do the job himself would be to stand by until help arrived. However, he did not do that in this case (118, 119A).

Plaintiff also indicated that changing the block when necessary was one of his jobs (171A).

## POINT I

### THE TRIAL JUDGE CORRECTLY DISMISSED PLAINTIFF'S COMPLAINT AGAINST ITO.

### (A)

### APPELLEE ITO VIOLATED NO DUTY WHICH IT OWED TO PLAINTIFF.

One of the violations of duty owed apparently claimed by plaintiff is that ITO through its employee "Joe the Harbor Master" once having offered help was negligent in failing to supply it.

At the conclusion of plaintiff's case ITO moved to dismiss the complaint. In so moving counsel indicated that despite the fact that plaintiff may have received an offer of help from the harbor master ITO was not under

duty to supply such help and could not properly be held liable for failure to give it (404,405A). He further indicated that even if the harbor master did in fact offer to help him plaintiff did not wait to have the help tendered to him (406A).

Plaintiff's counsel responded with the argument that since the ITO pier superintendent gave orders to the plaintiff, including an order to change the block, that it was ITO's duty to supply sufficient help to carry out this order (406A).

The Court responded that he did not feel a duty was created on the part of ITO merely because there was some testimony that help was sometimes given across employers' lines (405,406A). With respect to the issue raised by plaintiff's counsel that the plaintiff was only carrying out the orders of "Joe Chuck" the Court observed that the Rudolph companies were an independent contractor and changing the block was their business. In concluding his ruling on this point the Court said: "I do not find a duty to assist him on the part of any ITO person, but even if there was a duty to assist him, the person who said he was going to assist him was standing somewhere out of sight, and Mr. McSweeney made no effort whatsoever to use him" (411A).

Prosser, Law of Torts, 4th Ed. (1971) p. 344 says:

"....a mere gratuitous promise to render service and assistance, with nothing more, imposes no tort obligation on the promisor even though the plaintiff may rely on the promise and suffer damage because of that reliance." It follows that no duty arises where, as in the case at bar, there was no reliance. Plaintiff might have made out a case of violation of duty if the harbor master had actually entered upon performance of his promise to help. Since he did not there was no violation of duty owed to plaintiff.

Appellant's brief argues that defendants "developed the duties which they owed to plaintiff" by virtue of their knowledge of the fact that the containers to be loaded weighed more than the capacity of the R-5 equipped with the two part block. Based on this knowledge they should have done something to ease the burden on plaintiff (appellant's brief, p.9).

This argument ignores the fact that nothing in the record shows that ITO had anything to do with the hiring of the R-5 and had any way of knowing how it would be rigged when it arrived. Moreover, defendants Rudolph were clearly independent contractors, and responsible for the proper rigging of the crane. Placement of the

crane would be directed by ITO but proper rigging of the crane was the responsibility of the Rudolph defendants. No duty devolved upon ITO to insure that the crane arrived properly rigged even though it might have been aware of the weights of the containers to be lifted. A duty normally arises when there is a: "relation between the parties of such a character that social policy justifies the imposition of a duty to act." Prosser Law of Torts, 4th Ed. (1971) p. 339. There was no contractual or other relationship between ITO and defendants Rudolph save for the fact that they were both contractors to the vessel. Since ITO was neither under a contractual nor a tort duty relationship to plaintiff the trial judge correctly dismissed the complaint.

In Adams v. Ugland Management Co., 515 F. 2d 89 (CA 9th Cir. 1975) a longshoreman while engaged in docking a vessel was asked by two linesmen to climb down the side of the dock and free a heavy line. In doing so he fell into the water and drowned. The Court found nothing in the record to establish that there was a breach of duty owing to the longshoreman by the vessel. There was nothing in the record to suggest that there was any established practice respecting the freeing of snagged lines.

At bar there is nothing in the record to establish that there was a practice by ITO of supplying help to

change blocks. At one point plaintiff's counsel said he would offer proof of such custom and practice but it was never done (54-55A).

In Point II appellant makes the argument that since ITO's marine superintendent could give orders to change the location of the crane or to change the block, ITO owed a duty to render assistance when "Joe Chuck" ordered the block changed (appellant's brief, p.17). However, this ignores the fact that the work of changing the block was Rudolph's own work and not that of ITO. Plaintiff himself admitted that changing the block was his job (113-114A, 171A).

In Anderson v. International Mercantile Marine Co., 238 App. Div. 509 plaintiff was an inspector of freight aboard ships for his employer Corn Products. Defendant stevedore was loading goods belonging to plaintiff's employer. Instead of using a Jacob's ladder, plaintiff, at the invitation of a stevedore employee, hitched a ride on a cargo draft being raised out of the hatch. He was injured when the rope holding the draft broke. The Appellate Division dismissed the complaint and this was affirmed by the Court of Appeals at 264 N.Y.425. While the loading was being done on behalf of the defendant

stevedore, the inspector's work was being done on behalf of his own employers. Even if that was not true the stevedore employee had no right to bind the defendant by telling the plaintiff that he could ride on the draft.

In Murray v. O'Brien Bros. Inc., 227 App. Div. 43 plaintiff was employed as a dock foreman upon an open dock owned by the City of New York which leased wharfage rights to various contractors among whom was plaintiff's employer. Plaintiff was required to unload sand and gravel. In the course of his duties it became necessary to move a loaded barge and he endeavored to do that by attaching a rope to a windlass on the barge and to a dumper owned by one of the defendants. While trying to move the barge, it got out of control and he asked one employee of the defendant which owned the dumper to assist him. The employees did assist him by dropping a heavy bucket on the rope, producing slack, enabling plaintiff to wind the windlass, but while doing so plaintiff was injured. The Court held that the defendant, whose employee assisted the plaintiff, was not liable for the acts of the employee as they were beyond the scope of his duties. Defendant employer was in no wise interested in the work out of which the accident arose.

Both of the cases above were stronger on the facts than those at bar since "Joe the Harbor Master" never undertook any affirmative action to assist the plaintiff which might have given rise to a duty of care. There was no reliance by plaintiff. Absent either of these elements no duty arose. No duty was otherwise present, and ITO could not properly have been held for a violation where no duty existed. The dismissal as a matter of law was therefore proper.

(B)

THERE WAS NO RELATIONSHIP BETWEEN THE ALLEGED ABUSIVE LANGUAGE BY THE ITO EMPLOYEE AND PLAINTIFF'S ACCIDENT.

With regard to the harassment issue the Court found that the language described was not uncommon on the waterfront. He also said: "In any event, that harassment I find to have no proximate cause whatsoever to this injury" (411A).

One searches the trial transcript and appellant's brief in vain for any proof that there was a connection between the alleged abusive language and the accident.

At one point during cross-examination, plaintiff was confronted with his prior deposition testimony. Therein, he appeared to say that the reason he didn't

use a tag line to guide the four part block as it was lowered was that he was rushing because "Joe Chuck" was hollering at him (89A). However, his testimony was used to contradict his claim that no tag line was available. Moreover, plaintiff consistently attributed the accident to the twisting and lurching of the block and hook and never testified that his injury was suffered due to the fact that "Joe Chuck" was yelling at him during the lowering process.

In Basko v. Sterling Drug,Inc., 416 F. 2d 417 (1966) this court said: "Ordinarily, the concept of proximate cause can be stated in terms of a 'but for' test: defendant's negligence is a cause in fact of an injury where the injury would not have occurred but for the defendant's negligent conduct."

At bar, plaintiff failed to prove that level of causation. The trial judge was therefore correct in dismissing this aspect of plaintiff's complaint against ITO as a matter of law.

## CONCLUSION

The judgment dismissing the complaint as against INTERNATIONAL TERMINAL OPERATING CO.,INC. should be affirmed.

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CO.INC.

DOUGLAS A. BOECKMANN
Of Counsel

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

AFFIDAVIT OF SERVICE BY MAIL

Josephine P. Rattigan being duly sworn, deposes and says, that she is over the age of 18 years and a clerk in the office of SEMEL, McLAUGHLIN AND BOECKMANN, the attorneys for INTERNATIONAL TERMINAL OPERATING CO., INC. defendant/appellee herein; that on the 19th day of August, 1976 she served two copies of the annexed BRIEF upon the undersigned attorneys by mailing a true copy in a postpaid wrapper in a Post Office box maintained by the U.S. at 10 Rockefeller Plaza, New York, N.Y. 10020, directed to them at the addresses shown, heretofore designated by them for that purpose.

| NAME | ADDRESS | ATTORNEY FOR |
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| KIRLIN, CAMPBELL & KEATING | 120 B'way, NYC 10005 | deft.-appellee YAMASHITA SHINNIHON LINE |

Sworn to before me, this

19th day of August, 1976

Marion Boffa

MARION BOFFA
NOTARY PUBLIC, State of New York
No. 24-5367415
Qualified in Kings County
Commission Expires March 30, 1978

Josephine P. Rattigan